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NO. 571

THE NATIONAL BUREAU OF INVESTIGATION

UNITED STATES DEPARTMENT OF JUSTICE

SAMUEL M. DOUGLAS, Director of Investigation,
THE SPY BUREAU, CHICAGO, ILL.

THE UNITED STATES OF AMERICA

OF PROTECTIVE SERVICE, CHICAGO, ILL.
STATE DEPARTMENT, CHICAGO, ILL.
CHICAGO

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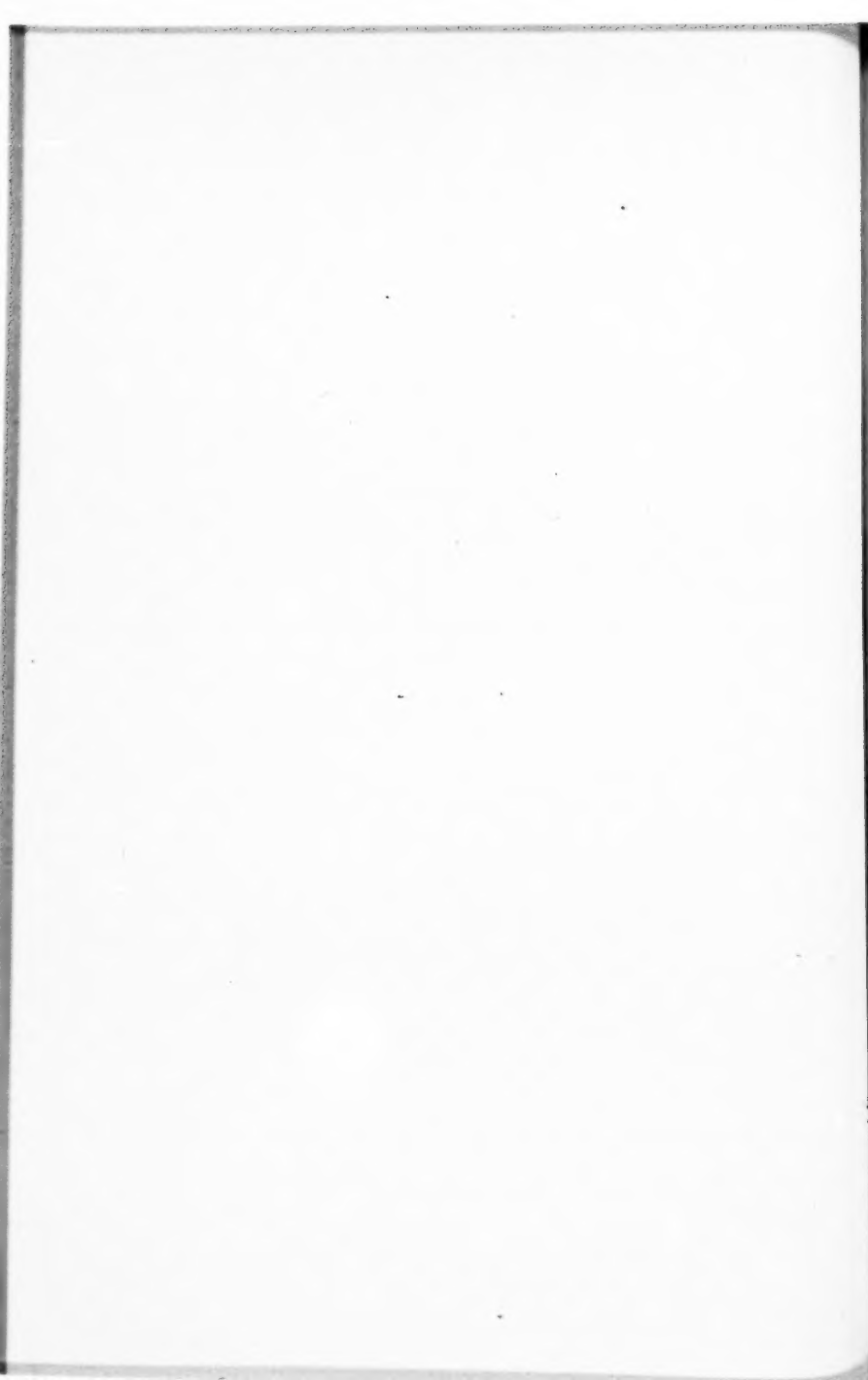
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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 574

SAMUEL M. COOMBS, TRUSTEE IN BANKRUPTCY OF
THE SPIER AIRCRAFT CORPORATION, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION.

OPINIONS BELOW

The memorandum opinion of the District Court (R. 3a-4a) is not officially reported. The opinion of the Circuit Court of Appeals (R. 66-72) is reported in 137 F. (2d) 736.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 4, 1943 (R. 72-73). The time within which to file a petition for a writ of certiorari was extended to and including January 3, 1944, by an order of Mr. Justice Roberts filed

November 4, 1943 (R. 74). The petition was filed on January 3, 1944. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The principal question presented is:

Whether a district court of the United States in a bankruptcy proceeding may direct the receiver of the bankrupt estate to turn over to the Government certain property requisitioned pursuant to the Act of October 16, 1941, as amended, and to institute such proceedings under the statute as shall be necessary to the protection of the rights of all the creditors of the bankrupt.

STATUTE INVOLVED

The applicable portions of the statute involved are set forth in the Appendix, *infra*, pp. 13-15.

STATEMENT

The bankrupt, Spier Aircraft Corporation, was a manufacturer of aeronautical parts and equipment (R. 66). On January 22, 1943, a petition in involuntary bankruptcy was filed against it in the United States District Court for the District of New Jersey (R. 1a). On January 29, 1943, petitioner was appointed receiver of the bankrupt and, upon qualifying, took possession of the assets of the bankrupt located at 200 Central Avenue, Jer-

sey City, New Jersey (R. 1a). The assets which came into the hands of petitioner consisted of a complete plant in which were set up machinery, equipment, tools and electric installations constituting a complete manufacturing unit (R. 18a-19a). On February 9, the Spier Aircraft Corporation was adjudicated bankrupt (R. 1a). Petitioner commenced negotiations for the sale of the bankrupt's property in his possession and received an offer of \$132,300 from Simmonds Aeroaccessories, Inc., which bid was sponsored by the Defense Plant Corporation (R. 11a-15a).

On March 4, 1943, the President of the United States, through his duly authorized representatives, determined, in the manner provided for in the Act of October 16, 1941, as amended by the Act of March 27, 1942, and the Executive Orders issued thereunder, that certain property of the bankrupt was needed for the defense of the United States, that such need was immediate and impending and would not admit of delay or resort to any other source of supply, and that all means other than requisition for obtaining the use of such property for the defense of the United States upon fair and reasonable terms had been exhausted (R. 38a). On or about March 5, 1943, while petitioner was negotiating and arranging for the sale of the bankrupt's assets, the United States served him with notice that in accordance with the Act of October 16, 1941, as amended, and

the Executive Orders of the President thereunder, certain of the bankrupt's machine tools, miscellaneous tools and equipment had been requisitioned (R. 19a-21a). On March 9, 1943, petitioner filed a petition with the District Court, alleging that the attempt to requisition the property was illegal, and seeking an order restraining the officers of the United States Navy, who had been designated to take possession of the requisitioned property, from interfering with the proposed sale of the bankrupt's assets (R. 18a-24a). On the same day the District Court issued a temporary restraining order as prayed, and a rule to show cause why it should not be made permanent, returnable March 10, 1943 (R. 24a-25a). On March 10, the United States filed a petition asking the District Court to direct petitioner to comply with the order of requisition and relinquish possession of the requisitioned property to the Government (R. 38a). The District Court granted the Government's petition and gave it leave to remove from the custody and possession of the receiver all of the property requisitioned (R. 6a). Petitioner was further ordered "to institute such proceedings" under the Act of October 16, 1941 as amended, "as shall be necessary to the protection of the rights of all the creditors of the above named bankrupt" (R. 7a).

Petitioner appealed to the Circuit Court of Appeals for the Third Circuit. Pending the hearing on appeal, the property was taken over by the

Navy Department, was distributed by it, and can never be reassembled (R. 67). The United States moved to dismiss the appeal on the ground that the question raised had become moot. The Circuit Court of Appeals denied the motion because the District Court's order had not only declined to enjoin the Government from requisitioning the bankrupt's property but had also directed the receiver to institute proceedings under the 1941 statute for the protection of the rights of creditors. (R. 67.) The Circuit Court of Appeals thereupon affirmed the order of the District Court.

ARGUMENT

Petitioner seeks to question the validity of the requisition on the ground that it was precluded by the exclusive bankruptcy jurisdiction over the property involved, and because the requisition allegedly did not observe certain statutory and constitutional criteria. Regardless of the merits of his contentions, there is no question of substance for this Court to review, since the relief which petitioner unsuccessfully sought below can no longer be granted. Moreover, the bankruptcy court properly authorized the removal of the property from its custody, thus eliminating the main issue which petitioner attempts to raise. In any event, the decision below was correct on the merits.

1. *There is no real issue of practical importance before this Court.*—(a) The only relief sought by

petitioner in the District Court was an order restraining the representatives of the Navy from interfering with the proposed sale of the bankrupt's assets, that is, from taking the assets by requisition. But the Government, uninhibited by any action of the District Court, has taken the assets; it has distributed them and they can never be reassembled (R. 67). Consequently, even should it be determined that the case was incorrectly decided below, it would be impossible on remand for the District Court to grant petitioner the relief which he originally sought.

While recognizing this, the court below nevertheless thought the case was saved from mootness because the order of the District Court directed petitioner to institute necessary proceedings under the statute "for the protection of the rights of creditors of the bankrupt" (R. 67). But a direction of this kind, hardly necessary in view of a receiver's duty to realize as much as possible from the bankrupt's assets, cannot breathe life into an academic controversy. Assuming that petitioner made out a case for the measure of relief which he sought, the disposal of the property could now leave petitioner with no different remedy than that allowed by the Act of October 16, 1941, under which the requisitioning power was asserted—a suit for just compensation. Indeed, if the taking were invalid because the requirements of the statute were not complied with, as petitioner asserts (Pet. 23-25), the result would be a tort

for which the United States has not consented to be sued. *Hooe v. United States*, 218 U. S. 322, 334-336; *Hughes v. United States*, 230 U. S. 24, 35. The receiver's only recourse at this time being, at most, an action to recover just compensation for the property, there is, in consequence, no real issue before this Court.

(b) There has been no disregard, here, of the jurisdiction of the bankruptcy court. It may readily be conceded that a bankruptcy court has power generally to protect its jurisdiction and the custody of the assets of a bankrupt by injunction. *Steelman v. All Continental Co.*, 301 U. S. 278, 290-291. But nothing was done here in disregard of that jurisdiction. The Government applied to the bankruptcy court for an order directing petitioner to turn over the requisitioned property to representatives of the Navy, and it was pursuant to an order of that court that such property came into the possession of the United States. That this permits the value of the property taken to be determined in a forum other than the bankruptcy court is no more objectionable than allowing value to be determined by competitive bidding, as petitioner desired; of course the Government's obligation to pay just compensation merely took the place of the property requisitioned. Cf. *The Sonora*, 50 F. Supp. 687 (S. D. Tex.).

Courts of bankruptcy have had no difficulty, even where the condemnation of the bankrupt's property took place under powers less urgent than

the war powers of Congress, in recognizing that those courts may properly release the condemned property for an adjudication elsewhere of its value. Cf. *Chicago, R. I. & P. Ry. Co. v. City of Owatonna*, 120 F. (2d) 226 (C. C. A. 8) (railroad condemnation); *Buckhannon & N. R. Co. v. Davis*, 135 Fed. 707, 710 (C. C. A. 4) (railroad condemnation); *City of Norton v. Lowden*, 84 F. (2d) 663 (C. C. A. 10) (condemnation by municipality). Indeed, this Court has recognized the discretionary power of a bankruptcy court to permit the trial in other forums of matters which for one reason or another are adapted to settlement elsewhere. *Thompson v. Magnolia Co.*, 309 U. S. 478, 483; *Foust v. Munson Lines*, 299 U. S. 77. Since the taking here was pursuant to order of the bankruptcy court and with its consent, this case offers no vehicle for consideration by this Court of the question whether property may be requisitioned out of the jurisdiction of a court of bankruptcy against its will.

2. *Property within the custody of a court of bankruptcy is subject to requisition.*—On the merits, the decision below is plainly correct. The power of the Government to requisition property cannot be considered to halt at the doors of the bankruptcy court. Such courts derive their jurisdiction not from the Constitution but from Congress, which has given them the power to protect such jurisdiction against interference by other courts. But this power, inherent in all courts of

equity, is not a limitation upon the authority of the sovereign which created it. In any conflict between a measure designed to promote the war effort and a general statute designed to protect private rights, the former must be considered paramount. Consequently, wherever the question has arisen the lower Federal courts have held that property in the custody of the bankruptcy court is not thereby withdrawn from the power of the sovereign to take it in furtherance of the war effort (*In re Inland Waterways*, 49 F. Supp. 675 (D. Minn.); *United States v. 1.94 Acres of Land*, 51 F. Supp. 162, 165 (M. D. Pa.)), just as property in the custody of a court of admiralty may be requisitioned under the war powers. *The Sonora*, 50 F. Supp. 687 (S. D. Texas); *The Pietro Campanella*, 41 F. Supp. 656 (D. Md.). See Marcus, *Taking and Destruction of Property Under a Defense and War Program*, 27 Corn. L. Q. 317, 476 (1942). In any event, the requisitioning statute, being later than the Bankruptcy Act, can appropriately be deemed a restriction by Congress upon the powers otherwise exclusively reserved to the bankruptcy court.

3. *The requisition order was proper.*—The Act of October 16, 1941, as amended, under which the instant property was taken, provides that machinery, tools and equipment (the class of property here involved) may be requisitioned by the President whenever he determines that such property

“is needed for the defense of the United States,” that “such need is immediate” and “will not admit of delay or resort to any other source of supply,” and that “all other means of obtaining the use of such property * * * upon fair and reasonable terms have been exhausted.” Such determination was made herein by the officials to whom the President had duly delegated his powers under the statute (R. 38a).

Petitioner urges that the facts are not consistent with this determination, and that the property could have been obtained expeditiously and upon fair terms through a bankruptcy sale. But Congress has entrusted to the Executive the determination as to the necessity for resort to the requisitioning power, and such a determination, made in the interest of the war effort (R. 42a), is not reviewable by the courts. *Dakota Central Telephone Co. v. South Dakota*, 250 U. S. 163; cf. *Hirabayashi v. United States*, 320 U. S. 81, 93; *United States v. Curtiss Wright Corp.*, 299 U. S. 304, 330-331.¹ Moreover, as the court below observed (R. 71), there was no showing of an abuse by the Executive in arriving at the determination that all other means had been exhausted. That the Government had available to it the opportunity to enter into competitive bidding for the property is not inconsistent with such determination, for

¹ *Alpirn v. Huffman*, 49 F. Supp. 337 (D. Neb.); *In re Inland Waterways*, 49 F. Supp. 675 (D. Minn.); *United States v. 1.94 Acres of Land*, 51 F. Supp. 162 (M. D. Pa.).

such an opportunity affords no certainty that the property could be purchased on reasonable terms or even that it could be obtained at all (R. 71).

4. *The taking does not violate the Fifth Amendment.*—Petitioner seeks to attack the fairness of the compensation to be paid for the property prior even to any determination as to what that compensation shall be. The Fifth Amendment of course does not require the fixing or payment of compensation prior to taking. *Hurley v. Kincaid*, 285 U. S. 95; *Crozier v. Krupp*, 224 U. S. 290. Provision is made in the Act for the determination of just compensation upon or subsequent to the taking. It provides that the President shall determine the fair value of the property taken, and if the amount so determined is satisfactory to the owner of the property, it is to be paid to him. If it is unsatisfactory, he may receive 50% of the amount and bring suit in the Court of Claims or in the District Courts of the United States for recovery of an additional amount which he believes necessary to constitute just compensation. All questions of value, including the value of the assets of the bankrupt as a going concern and of the impact thereon of the ceiling price fixed by the Office of Price Administration, are matters properly to be addressed to the courts designated by the statute to determine just compensation. *United States v. New River Collieries*, 262 U. S. 341, 343; *Monongahela Navigation Co. v.*

United States, 148 U. S. 312, 327; cf. *United States v. Grizzard*, 219 U. S. 180 (severance damages). It assuredly may not at this stage be assumed that those questions will be decided in a manner violative of any rights of petitioner under the Fifth Amendment.

CONCLUSION

The case presents no question requiring review by this Court. There is no conflict and the principal question in its present posture lacks substantial importance. We respectfully submit that the petitioner's writ of certiorari should be denied.

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JANUARY 1944.

